

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 12, 2008

In the Matter of :
 :
MICHAEL SASSANO, : ORDER ON PENDING MOTIONS
DOGAN BARUH, :
ROBERT OKIN, and :
R. SCOTT ABRY :

In this Order, I grant the Division of Enforcement's (Division) motion for a protective order and rule that the Division need not permit Respondents to inspect and copy the back-up storage tapes of e-mails from/to former staff members who worked on the NY-7220 investigation. I also grant the joint motion of the Division and Respondent Robert Okin (Okin) to stay the proceeding as to Okin so that the Securities and Exchange Commission (Commission) can consider Okin's settlement offer.

I.

By January 29, 2008, the Division was required to make the non-privileged portions of its investigative file available to Respondents for inspection and copying (Orders of January 15, 2008, and June 8, 2007). In a letter dated February 7, 2008, Respondent R. Scott Abry (Abry), on behalf of all Respondents, alleged that the Division's January 29, 2008, production materially failed to comply with the Orders of January 15, 2008, and June 8, 2007. By letter dated February 12, 2008, the Division maintained that it has fully complied with its obligations under the January 15, 2008, and June 8, 2007, Orders. I have already addressed most of the issues raised by Abry, but I deferred a ruling on one issue pending development of the record (Order of February 21, 2008).

The Division has not searched the back-up storage tapes of e-mails from/to former staff members who worked on the NY-7220 investigation. Abry claimed that Respondents are entitled to inspect and copy such materials (Abry's February 7 letter at 4). The Division argued that the burden and expense of producing such materials would be considerable and would outweigh any benefit to Respondents because such materials would likely be irrelevant or privileged (Division's February 12 letter at 8).

By Order dated February 21, 2008, I treated Abry's February 7 letter as the equivalent of a motion to compel production of the back-up storage tapes, and the Division's February 12 letter as the equivalent of a motion for a protective order. I required the Division to develop the record about the claimed burden and expense of producing such materials, and I afforded Respondents an opportunity to reply to any materials the Division submitted.

On February 29, 2008, the Division submitted the sworn declaration of Paul J. Cattaneo (Cattaneo), a branch chief in the Servers and Storage Branch of the Commission's Office of Information Technology. The Division also submitted a brief, arguing in relevant part that Abry's motion to compel production of the back-up storage tapes should be denied (Div. Br. at 4-6). Abry has not replied to the Division's submission.

Under Rule 230(b)(1)(iv) of the Commission's Rules of Practice, the Division may withhold a category of documents from inspection and copying "for good cause shown," if the hearing officer grants leave to withhold. The Rule defines the term "documents" to include "data stored by computer, from which information can be obtained."

In assessing the parties' positions, I have been guided by Federal Rule of Civil Procedure 26(b)(2)(B), which provides specific limitations on the discovery of electronically stored information. Under that Rule, a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The Rule further provides that, on motion to compel discovery or motion for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. While the Federal Rules of Civil Procedure do not govern the Commission's administrative proceedings, they are often helpful in resolving issues not addressed by the Commission's Rules of Practice.

Based on the Cattaneo declaration, I conclude that the Division has satisfied its burden of showing that the back-up storage tapes of e-mails are not reasonably accessible because of undue burden and cost. Pursuant to Commission Rule of Practice 230(b)(1)(iv), and by analogy to Federal Rule of Civil Procedure 26(b)(2)(B), I therefore grant the Division's motion for a protective order and deny Abry's motion to compel production. There is good cause for withholding the back-up storage tapes of e-mail from inspection and copying.

II.

By joint motion dated March 10, 2008, the Division and Okin state that Okin has submitted a signed settlement offer to the Division. The Division and Okin move pursuant to Rule 161(c)(2) of the Commission's Rules of Practice for a stay of the proceeding, solely as to Okin, pending completion of the Commission's consideration of Okin's settlement offer. The motion for a stay is granted, solely as to Okin, contingent on the Division's and Okin's compliance with the requirements of Rule 161(c)(2) of the Commission's Rules of Practice. If the Division or Okin fail to meet the requirements of Rule 161(c)(2), or if the Commission rejects the settlement offer, the Division shall promptly notify this Office.

SO ORDERED.



James T. Kelly
Administrative Law Judge